

1999

Why Rubbish Matters: The Neoconservative Underpinnings of Social Constructionist Theory

Steven G. Gey

Follow this and additional works at: <https://scholarship.law.umn.edu/mlr>



Part of the [Law Commons](#)

Recommended Citation

Gey, Steven G., "Why Rubbish Matters: The Neoconservative Underpinnings of Social Constructionist Theory" (1999). *Minnesota Law Review*. 2381.
<https://scholarship.law.umn.edu/mlr/2381>

This Article is brought to you for free and open access by the University of Minnesota Law School. It has been accepted for inclusion in Minnesota Law Review collection by an authorized administrator of the Scholarship Repository. For more information, please contact lenzx009@umn.edu.

Why Rubbish Matters: The Neoconservative Underpinnings of Social Constructionist Theory

Steven G. Gey[†]

Anyone who has paid the slightest attention to legal scholarship during the last ten years will already be familiar with the theories patiently addressed by Daniel Farber and Suzanna Sherry in their book *Beyond All Reason*.¹ This book is already notorious in some circles, although non-academics will be mystified that such a ruckus could be raised by a text that sets for itself the modest task of defending the value of concepts such as truth, reason, and merit. The fact that academics will not be at all surprised by the book's infamy says a lot about the distance the academy has traveled from society outside the ivy-covered walls.

Farber and Sherry address a motley batch of theories that constitute this season's academic *haute couture*, including critical race theory, radical feminism, gaylegal theory, the remnants of Critical Legal Studies, and variations on the diffuse themes of postmodernism and deconstruction. As Farber and Sherry note,² the thing that unifies these otherwise disparate intellectual fashions is their uniform reliance on social constructionist theory—i.e., the assertion that reality is subjective and socially constructed—along with the corollary notion that universalism, objectivity, reason, and merit are harmful concepts useful mainly as methods of bolstering the dominance of the status quo.

Farber and Sherry serve an important function in *Beyond All Reason* by challenging the claims of political purity and progressivism that usually accompany social constructionist

[†] John W. and Ashley E. Frost Professor of Law, Florida State University College of Law.

1. DANIEL A. FARBER & SUZANNA SHERRY, *BEYOND ALL REASON: THE RADICAL ASSAULT ON TRUTH IN AMERICAN LAW* (1997).

2. See *id.* at 4-5.

theory. This is important, because Farber and Sherry cannot logically be dismissed as Neanderthal right-wing opponents of egalitarian or civil libertarian critiques of the existing order. Rather, Farber and Sherry take care to consider social constructionist theory on its own terms, as a body of doctrine specifically intended to foster a more just and equitable social order. Much of Farber and Sherry's book addresses the details of social constructionist theory's failure to live up to its progressive promise, and they focus particular attention on the anti-Semitic and racist conclusions that often follow from different aspects of social constructionist theory. This is an important contribution to the debate over these theories, but Farber and Sherry's consequentialist approach does not exhaust the list of reasons why these supposedly progressive theories are, at bottom, intrinsically conservative if not reactionary in their approach to social and legal doctrine.

My contribution to the debate over Farber and Sherry's book will sketch the outlines of the deeper conservatism that lies at the core of social constructionism. I use the term "conservatism" in the most basic sense, to denote three characteristics that can be found in all manifestations of social constructionist theory: the antipathy to popular rule, resistance to social change and political evolution, and deference to common manifestations of political authoritarianism. These conservative characteristics are consequences of the idiosyncratic way social constructionists approach two phenomena: truth and power.

This is the essence of social constructionism's progressive dilemma: social constructionists deny that truth is a valid analytic concept, and they also deny that a rational analysis of social conditions can contribute anything meaningful to debates about reality, other than to express the analyst's own socially constructed personal perspective. Having dispensed with truth and rationality, however, social constructionist theories must substitute some other normative reference point for human interaction and political decisionmaking. The various different social constructionist theorists respond by positing their own group's interests as the central defining factor in assessing the legitimacy and desirability of existing social, political, and legal arrangements. Thus, critical race theorists criticize existing society as racist, feminists view society as sexist, and so forth.

These two precepts form the heart of social constructionist theory: first, that truth is chimerical, and second, that power in the form of group interests should provide the normative substitute for rationally derived, more universalist assessments of political and legal legitimacy. Both of these precepts have deeply conservative implications for social constructionist theory. Not only do these precepts render broad-based progressive coalitions unlikely, they also rob the left of the intellectual tools that make *any* social critique possible. Every social value is rendered equivalent to every other social value, and policy choices are (and according to the social constructionists, will inevitably be) based solely on the most powerful group's self-interest. Social constructionism effectively replaces the aspiration for truth with the quest for power. If values are shaped by the most powerful socially constructed group, then it is crucial that one's own group accumulate as much power as possible. "We take these truths to be self-evident" is replaced by "What's in it for us?" This, then, is the odd brand of postmodern progressivism to which Farber and Sherry respond—a selfish, solipsistic progressivism that somehow manages to provide demagogues on both the right and the left with a handy justification for self-righteous tyranny.

I. SOCIAL CONSTRUCTIONISM AND THE SUBSTITUTION OF "TRUTH" FOR TRUTH

Social constructionism's political problems begin with the theory's most basic contentions that all assertions of truth are subjective expressions of group self-interest, and that this collective self-interest in turn defines the values of all individuals within the group.³ At one level, these aspects of social constructionism are uncontroversial. At the lowest level of abstraction, these contentions simply express the common-sense recognition that everyone's perspective reflects his or her own experiences in life, and the equally commonplace recog-

3. I am assuming that the reader is familiar with the description of social constructionist thought in the book that is the focal point of this symposium. Therefore, to the extent that my assertions about social constructionist thought coincide with Farber and Sherry's, I have not provided further references beyond those cited in the book, especially *id.* at 3-33. I have provided citations where my assertions about social constructionism go beyond Farber and Sherry's, or where specific references will clarify the discussion in the text.

nition that these experiences are heavily influenced by other members of each person's family and social group. At higher levels of abstraction, however, these central axioms of social constructionism abandon common sense and become a justification for the raw assertion of parochial, group-specific "truths" that can be neither confirmed nor contested by anyone outside the group.⁴ Social constructionist "truths" cannot be confirmed

4. Although there are overtones of relativism throughout the social constructionist challenge to the rationalistic concept of truth, in fact the social constructionists do not abandon the concept of truth at all. The thrust of social constructionist theory is not that truth does not exist, but rather that each group has its own "truth," which is perceived subjectively and communicated anecdotally through stories rather than systematically through rational critique and empirical analysis. Thus, social constructionists are just as wedded to the importance of "truth" as those of us who are fond of the liberal Enlightenment approach to the world.

There are, however, two differences between the liberal and social constructionist approaches to truth. The first difference is that liberals feel compelled to identify and articulate normative truths that have some appeal to everyone in society, including those who are unlike themselves, whereas the social constructionists give up on the attempt to construct any but the most parochial and self-interested "truths." The liberal truths that are intended to appeal to nonliberals are often no more grandiose than the weakly universalist truth that it is safer for everyone to live in a society based on peaceful coexistence between ideological adversaries rather than a society that permits ideological battles to the death. But even this weak universalism seems beyond the social constructionists, who sometimes mock the very notion that such a premise is anything more than a surreptitious effort to win ideological battles by default. See, e.g., Stanley Fish, *Liberalism Doesn't Exist*, 1987 DUKE L.J. 997, 1000 (arguing that liberalism "does not have at its center an adjudicative mechanism that stands apart from any particular moral and political agenda," but rather has "a very particular moral agenda (privileging the individual over the community, the cognitive over the affective, the abstract over the particular)").

The second difference between the Enlightenment liberal and social constructionist attitudes toward truth is that liberals join Hannah Arendt in asserting that political action must be limited by the realm of factual truth defined as "those things which men cannot change at will." HANNAH ARENDT, *BETWEEN PAST AND FUTURE: EIGHT EXERCISES IN POLITICAL THOUGHT* 263-64 (1954). Contrast the social constructionist attitude toward factual truth—i.e., as a malleable political construct defined entirely by the subjective perspective of interested groups—with Arendt's defense of "stubborn" truth against politics:

That facts are not secure in the hands of power is obvious, but the point here is that power, by its very nature, can never produce a substitute for the secure stability of factual reality, which, because it is past, has grown into a dimension beyond our reach. Facts reassert themselves by being stubborn, and their fragility is oddly combined with great resiliency—the same irreversibility that is the hallmark of all human action. In their stubbornness, facts are superior to power; they are less transitory than power formations, which arise when

because they are premised on the assumption that empirical methods of analysis are incurably corrupted by the status quo,⁵ a stance that conveniently robs critics of the ability to point out that some social constructionist verities are contradicted by the unmediated facts of the world around them. At the same time, social constructionist "truths" cannot be contested because social constructionists posit that all attempts to dispute the facts or logic that lie behind social constructionist assertions are tainted by a self-interested power structure. Thus, criticism of social constructionism is *by definition* invalid. Someone who criticizes social constructionism is simply dismissed as a badly constructed critic.

The social constructionists assert that efforts to justify existing social structures by reference to rational and objective standards are inherently biased. As with all aspects of social constructionism, this claim contains a kernel of truth. No argument or observation will ever be entirely rational, objective, or untainted by the observer's bias. Even the most broad-minded social critic cannot completely escape the perspective-warping burdens imposed by the critic's own position in the world. But the very concepts of rationality and objectivity express the aspiration (admittedly often unrealized) that all things are subject to question and all claims of truth are tentative and subject to review if the facts warrant. The aspiration to rationality and objectivity also expresses the humbling recognition that reality has some external existence outside the narrow confines of a particular observer's consciousness, which at least should make the observer hesitate before rejecting the conflicting observations inherent in other observers' perspectives.

The key aspect of the aspiration to rationality and objectivity, and the thing that makes liberal Enlightenment approaches conducive to producing progressive political results, is that rationalist critics who apply their critical framework consistently must apply that framework most

men get together for a purpose but disappear as soon as the purpose is either achieved or lost. This transitory character makes power a highly unreliable instrument for achieving permanence of any kind, and, therefore, not only truth and facts are insecure in its hands but untruth and non-facts as well.

Id. at 258-59.

5. See FARBER & SHERRY, *supra* note 1, at 28 (discussing social constructionist hostility to empirical analysis).

rigorously to the critics' own beliefs and assumptions. In contrast, the social constructionist premise that all subjective perceptions are "true" in the sense that they reflect a uniquely accurate perspective has the effect of rendering every person's beliefs and assumptions unassailable. The social observer who takes social constructionist arguments seriously will have little incentive to question his or her own beliefs. Indeed, the social constructionist observer has a major disincentive to question his or her own beliefs, since such questioning can be viewed as an attempt to distance the observer from the observer's own circumstances and therefore represents an exercise of bad faith.⁶ This self-confirming subjectivism makes critique of any kind impossible (since every social perspective is as a matter of theory "true" to its own social origins), and thus leads to the pessimistic conclusion that all "truth" is a function of power. This conclusion leads, in turn, to an ideological battle to the death for the right to enshrine one group's "truth" as preeminent over every other group's "truth"—hardly a recipe for progressive governance of a pluralistic culture.

In contrast to social constructionism, rationalist liberal approaches to social organization are based on the assumption that collective value judgments cannot be entirely self-referential. Rationalist approaches also assume that even the most carefully thought-out human framework can only imperfectly control and regulate the larger objective reality in which human societies operate. A system of social, political, and legal norms that aspires to rationality and objectivity—however imperfectly realized—thereby acknowledges its own fallibility. Such a system acknowledges that the system will eventually abandon or significantly recast some of its most treasured tenets if further analysis reveals that some aspect of the system no longer accurately reflects or responds to our changing perceptions of what is valid, important, and—in a factual sense—true.

6. See, for example, Catharine MacKinnon's attack on feminist lawyers who disagree with her proposals to impose civil sanctions on pornography. She attributes what she perceives to be their bad faith in part to the fact that they have been inculcated in liberal values by their legal education. "What law school does for you is this: it tells you that to become a lawyer means to forget your feelings, forget your community, most of all, if you are a woman, forget your experience." CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 205 (1987).

Social constructionists correctly point out that claims of rationality and objectivity in social, political, and legal analysis are often a pretense for self-interest. But the claims themselves are important because they implicitly acknowledge the vulnerability of all assertions about truth and the possibility—indeed, the inevitability—that the status quo will always be subject to critique on the basis of evidence that cannot be controlled or contained within the system. If new evidence or further experience undermines the factual basis for the normative assumptions on which the system is based, then a social theory premised on objective analysis will dictate that the flawed part of the system must be altered or abandoned. All such systems therefore carry within them the seeds of their own ideological destruction because rationalist analysis operates on the assumption that every existing belief system is unstable and imperfect and will eventually be superseded by another, more rational set of social principles.

The same assumptions of instability and inevitable change cannot be found in social constructionist theories. Whereas rationalist social systems are inherently fluid and ideologically unstable (because they are constantly subject to critique based on the need to accommodate external facts and logical inconsistencies), the postmodern social constructionist system is leaden and intransigent. According to the social constructionist view, no perspective is inherently superior to any other, and even the most eccentric perspective on reality may legitimately be embraced even if it flies in the face of both logic and evident facts.⁷ Subjective certainty is the key factor in defining values within a social constructionist system, and if certainty can be maintained, any set of values is impregnable to challenge or change. For all their pretensions to social progressivism, therefore, the social constructionist world is conservative in the most basic sense—i.e., in the sense that values are contained within a closed system of subjective beliefs that are completely insulated from contrary evidence and hostile critique.

Social constructionist theory assumes that dominant social values are the product of little more than the will to power, and therefore even the most idiosyncratic set of values can define

7. The social constructionists' defense of Tawana Brawley's "story" despite its factual falsehood is the most obvious example of this tendency. See *infra* note 12.

the world indefinitely if its proponents remain resolute. Social constructionists are therefore logically incapable of mustering any real challenge to the structure of existing social hierarchies, nor can they present consistent proposals to mitigate the ideological distortions of political power relationships. Social constructionists can only search for ways to elevate their own groups in the social hierarchy, so that their own favored perspectives can define society in their own image. This unending battle over the power to interpret the world (from which follows the power to construct the citizenry) defines the essentially fatalistic and pessimistic political view of social constructionist theories—a political view that is perhaps the single most important characteristic of political conservatism.

Social constructionists replace the liberal aspiration to rationality and objectivity with the bald assertion of blind faith in what is subjectively perceived. By deriding the value (or even the possibility) of objective analysis, value-neutral empirical investigation, and logical proof, the social constructionists finally rely on a religious epistemology, according to which truth is an entirely subjective phenomenon that is derived exclusively from each observer's personal connection with a reality that nonadherents cannot access. It is not coincidental that the social constructionist approach to reality proposed by theorists of the critical race/feminist/postmodernist schools on the political left has also been used to defend the theory of creationism, a sectarian substitute for scientific analysis advanced by members of the religious and political right.⁸

It is easy to see why individual believers find this religious epistemology appealing. Belief in a prescribed reality situates the believer in the world, and provides a level of psychological stability and comfort that is difficult to forgo. In contrast, rationalism and empiricism are comparatively disconcerting because they challenge deeply-held faith, destabilize the believer's world, and generate existential doubt about the believer's intrinsic value and place in the universe. Social constructionist true believers respond to the destabilizing threat of Enlightenment modes of thought in the same way as their religious brethren respond to the threat posed by science. William Jennings Bryan responded to the threat posed by

8. See, e.g., Frederick Mark Gedicks, *Public Life and Hostility to Religion*, 78 VA. L. REV. 671 (1992); Fish, *supra* note 4.

science by suggesting that "[i]t would be better to destroy every other book ever written, and save just the first three verses of Genesis."⁹ The progressive social constructionists respond in similar fashion by seeking to remove protection from speech that challenges their own preferred view of reality.¹⁰

The adoption of a religious epistemology permits social constructionist theorists of the secular left as well as the religious right to deny not only social facts, but also what the philosopher John Searle calls "brute facts."¹¹ Social facts impute meaning to objects or practices that would otherwise remain meaningless (such as the way in which society ascribes meaning to a dollar bill or a red light at an intersection), while "brute facts" exist independent of human intentions. The existence of the planet Jupiter is a brute fact, and so are the many mundane and often harsh facts of the world that form the raw material out of which society shapes its values and recognizes its limits. Social and legal policy must take account of brute facts because these brute facts bracket and limit the possibilities of human activity. Social constructionists deny this reality by focusing on their own subjective reaction to the world, which permits them to devise and defend policies even when the factual basis for those policies is dubious or even demonstrably untrue.¹²

9. RICHARD HOFSTADTER, *ANTI-INTELLECTUALISM IN AMERICAN LIFE* 125 (1963).

10. Catharine MacKinnon has argued, for example, that the equality guarantee of the Fourteenth Amendment should be used to prohibit "expressive means of practicing inequality." CATHARINE A. MACKINNON, *ONLY WORDS* 107 (1993). Thus, she argues for the removal of First Amendment protection of pornography and hate speech, and asserts that in an educational setting it would be harassment to expose students to false ideas, including "academic books purporting to document women's biological inferiority to men, or arguing that slavery of Africans should return, or that Fourteenth Amendment equality should be repealed, or that reports of rape are routinely fabricated." *Id.*

11. JOHN R. SEARLE, *THE CONSTRUCTION OF SOCIAL REALITY* 27 (1995).

12. One example of the social constructionist tendency to persist in defending "stories" that turn out to be untrue is Patricia Williams' insistence that Tawana Brawley was the victim of "some unspeakable crime. No matter how she got there. No matter who did it to her—and even if she did it to herself." PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* 169-70 (1991). (Brawley claimed that she had been kidnapped, raped, and mutilated, but evidence indicated that the kidnap and rape did not occur and the mutilation was self-inflicted. See FARBER & SHERRY, *supra* note 1, at 95-117.) The social constructionist insistence on privileging "stories" over facts has problematic consequences in developing public policy. Similar attitudes have

Radical subjectivism may be defensible as an aesthetic or literary approach in an area where the meanings of texts and images can be subject to endless (and relatively harmless) dispute. But the refusal to recognize a reality independent of tendentious subjective perception becomes much more dangerous when it is combined with the allocation of authority in a society where a small group of political actors will exert ultimate power over all those within a particular jurisdiction. Social constructionist theory has no apparent method by which to limit the exercise of political power by dominant members of society. Having abandoned truth, all the social constructionists have left is power. The implications of this substitution of power for truth are the subject of the next section, but in passing it is worth noting again how odd it is that a supposedly progressive analysis articulated on behalf of disadvantaged groups generates a theory that would remove virtually all structural restrictions on the unrestrained exercise of the very thing that these groups lack—i.e., political power.

II. SOCIAL CONSTRUCTIONISM AND THE SUBSTITUTION OF POWER FOR TRUTH

When social constructionists renounce the possibility of ascertaining an objective reality that is external to the individual observer, they effectively provide the dominant social observer with absolute authority to define reality and mould it to the observer's will. Insofar as the social constructionists would abandon a constitutional regime that incorporates a liberal Holmesian skepticism about officially mandated orthodoxies,¹³ the dominant observer would also be

contributed to the rush to adopt legislation that criminalizes a vaguely defined category of "hate crimes" despite a lack of hard evidence to back up claims that such crimes are rapidly increasing, the absence of strong arguments to suggest that existing, generic criminal laws inadequately punish hate crime perpetrators, and the potential conflict between such statutes and defendants' constitutional rights. For a critical discussion of the first two points, see JAMES B. JACOBS & KIMBERLY POTTER, *HATE CRIMES: CRIMINAL LAW & IDENTITY POLITICS* (1998). For a discussion of the third point, see Steven G. Gey, *What if Wisconsin v. Mitchell Had Involved Martin Luther King, Jr.? The Constitutional Flaws of Hate Crime Enhancement Statutes*, 65 GEO. WASH. L. REV. 1014 (1997).

13. See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("[W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the

permitted to define the social reality for everyone else in society. The paradox is that the subjectivist epistemology of social constructionism contradicts most of their critique of liberal Enlightenment approaches to law and social policy.

The social constructionist challenge to liberal legal theory is based on a rejection of the liberal claim that a system of constitutionally limited government permits many divergent modes of thought to peacefully coexist without forcing any group to renounce its most basic beliefs in order to participate in democratic self-governance. The social constructionists challenge this assumption on the grounds that by creating such a system, liberals surreptitiously undermine alternative ideologies by forcing these liberal challengers to fight the battle over social norms on hostile liberal terms. Thus, liberals supposedly undermine traditional religious views by imposing on public debates the liberal assumptions of fallibilism and pluralism,¹⁴ devalue the perspective of gender dissidents by requiring debates over social policy to be conducted in a logical framework using empirical analysis,¹⁵ and perpetuate discrimination against racial minorities by protecting the rights of those who verbally express racial hatred.¹⁶ The theme underlying all these critiques is that liberalism is insufficiently cognizant of cultural diversity, hence Farber and Sherry's use of the term "radical multiculturalists" to describe liberalism's critics.¹⁷

The fatal flaw of the multicultural/social constructionist critique is that abandoning liberal political processes in favor

thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.").

14. See Stanley Fish, *Mission Impossible: Settling the Just Bounds Between Church and State*, 97 COLUM. L. REV. 2255, 2331 (1997). According to Fish, the assumptions of fallibilism (i.e., the view that "all our views are partial and therefore challengeable") and pluralism (i.e., the view that "the more points of view in play the better") marginalize those who adhere to absolutist religious faiths, and therefore "mandate that liberalism wins." *Id.*

15. See MACKINNON, *supra* note 6, at 54 ("If feminism is a critique of the objective standpoint as male, then we also disavow standard scientific norms as the adequacy criteria for our theory, because the objective standpoint we criticize is the posture of science.").

16. See Charles R. Lawrence, III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431, 444 ("[A]ll racist speech constructs the social reality that constrains the liberty of non-whites because of their race.").

17. FARBER & SHERRY, *supra* note 1, at 5.

of unmediated social constructionism would produce a political and legal structure that would be more, not less, likely to disparage, devalue, and discriminate against groups that are not part of the controlling power structure that defines society's dominant ideology. Unless social constructionists have discovered a heretofore hidden route to a social utopia in which society will be based on total equality among groups and no group will possess more political power than any other, they must acknowledge that even in a social constructionist state some groups will be more powerful than others. Thus, the social constructionist alternative to liberal constitutionalism will face the same problem of ideological domination that the critics find objectionable in the current regime. The only difference is that the group at the top of a social constructionist power structure will have absorbed the social constructionist "truth" that reality is whatever that group subjectively perceives it to be, an epistemologically arrogant attitude that can be expected to replicate itself in the powerful group's exercise of power.

The arrogance of power that is built into the social constructionist system can be seen in the social constructionist attacks on First Amendment protections of expressive and religious freedom. Social constructionists relentlessly disparage the notion that courts should protect the speech of those with whom the constructionists disagree.¹⁸ Stanley Fish has applied a similar analysis in arguing against Establishment Clause restrictions on the infusion of religion into government.¹⁹ The same corrosive logic would presumably apply to the other parts

18. Some of the most prominent examples of this literature include Lawrence, *supra* note 16 (supporting restrictions on hate speech); Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320 (1989) (same); Richard Delgado & Jean Stefancic, *Hateful Speech, Loving Communities: Why Our Notion of "A Just Balance" Changes So Slowly*, 82 CAL. L. REV. 851 (1994) (same); MACKINNON, *supra* note 10 (supporting restriction of pornography, hate speech, and various other verbal attacks on equality principles); STANLEY FISH, THERE'S NO SUCH THING AS FREE SPEECH AND IT'S A GOOD THING, TOO 104 (1994) (arguing against the principle of judicially protected free speech on the ground that "[s]peech . . . is never a value in and of itself but is always produced within the precincts of some assumed conception of the good to which it must yield in the event of conflict").

19. See Fish, *supra* note 14 (arguing against Establishment Clause protections against religious involvement with the state); Fish, *supra* note 4 (criticizing liberal premises of Establishment Clause doctrine that prohibits the advocacy of religious doctrine in public schools).

of the Bill of Rights as well, including Fourth, Fifth, Sixth, and Eighth Amendment protections against excessive applications of the government's power to enforce the law against those who violate society's norms. All of these protections are based on the same liberal Enlightenment notion that individuals should be protected from the excesses that inevitably result from the collective exercise of power.

The social constructionist bottom line is that no constitutional system can avoid the Hobbesian reality that raw politics ultimately defines social values, and that politics is nothing less than the battle between subjective absolutes whose proponents have little reason to respect the competing absolutes of their ideological adversaries.²⁰ For all their paeans to multicultural relativism, social constructionists are actually absolutists in the end because they cannot devise a consistent theory to prevent one socially constructed group from permanently establishing its subjective reality as the defining ideology of a society it controls. Since the social constructionists must acknowledge that many groups will define their subjective perspective on society in terms of moral and political absolutes, the social constructionists willingly open the door to the imposition of such absolutes on everyone in society—including those who have arrived at a very different subjective approach to the world, but who lack the political power to prevail in the competition for social dominance. Social constructionists cannot escape this trap by establishing structural safeguards to prevent a power grab by one group

20. There are several parallels between the social constructionist and Hobbesian views of humanity. Like Hobbes, the social constructionists believe that humans derive their notions of right and justice from the habits and customs of their social upbringing. Thus, "like little children, [they] have no other rule of good and evill manners, but the correction they receive from their Parents, and Masters." THOMAS HOBBS, *LEVIATHAN* 52 (Everyman ed. 1983). Also like Hobbes, the social constructionists view reason as a largely pragmatic and dispensable attribute, since humans, "grown strong and stubborn . . . appeale from custome to reason, and from reason to custome, as it serves their turn; receding from custome when their interest requires it, and setting themselves against reason as often as reason is against them." *Id.* The social constructionists and Hobbes both view truth as an instrumental phenomenon, in that "men care not, in that subject what be truth, as a thing that crosses no man's ambition, profit, or lust." *Id.* at 52-53. And finally, both the social constructionists and Hobbes see in the competing visions of reality among different individuals and groups "a general inclination of all mankind, a perpetual and restlesse desire of Power after power, that ceaseth onely in Death." *Id.* at 49.

because to do so would lead social constructionists back to precisely the sort of liberal constitutional protection against political absolutism that the social constructionists have labored for so long to escape.

The absolutist trap into which social constructionists inevitably fall can be traced to the contradictory impulses evident throughout the social constructionist literature. As noted above, social constructionists routinely attack the use of syllogistic logic, rationality, and objective analysis of social problems, and propose instead that social policy should be developed through the telling of "stories" and other emotive descriptions of subjective perceptions of reality. Like many other aspects of social constructionism, this attack on rational discourse has its roots in recent French intellectual fashions, especially Jean-Francois Lyotard's endorsement of "narrative knowledge," which "certifies itself in the pragmatics of its own transmission without having recourse to argumentation and proof."²¹

Like their French counterparts, however, the social constructionists cannot escape playing the game that they insist cannot be played. Social constructionist "stories" are supposed to convey a sense of a separate reality apart from the empirical world of objective liberal policy analysis, but the "stories" are really used to support the much more mundane claim that liberalism fails to live up to its promises. The social constructionists may rely on emotion and subjective blind faith to support their claims against liberalism, but their underlying message is barely distinguishable from a standard rationalist critique. When the social constructionists claim that their opponents have ignored or misjudged facts, or have relied upon sloppy logic and flawed reasoning, the social constructionists implicitly concede that there is maybe something to rational liberal social analysis after all.²² The stories are not that

21. JEAN-FRANCOIS LYOTARD, *THE POSTMODERN CONDITION: A REPORT ON KNOWLEDGE* 27 (1984).

22. The very fact that the social constructionists take the time to critique liberal legal theory in such detail probably dictates that their critique will ultimately take the form of the very doctrine they reject. To the extent that the social constructionists are not just talking to themselves, but are actually trying to win the debate over liberalism and implement their policy goals, they must cast their arguments about the failures of liberalism in a form that is accessible to the ideological adversaries they are trying to convert. Unfortunately, this effort to articulate mutually accessible reasons for the failure of liberalism probably undermines their claims that all critique is

different in content from the fodder of standard empirical analysis, except that they are cast in a form that makes it impossible to measure their accuracy or ensure their typicality. The social constructionists' dense theoretical discussions and wrenching descriptions of personal experience are just window dressing for some very traditional policy arguments over the meaning of equality, justice, and freedom, which in turn form the basis of arguments about the nature of democratic legitimacy. The social constructionist discussions of these issues are more overtly political than those of their opponents, but it is an ethereal, multisyllabic, ivy-tower kind of politics—politics as parlor game.

If the social constructionists were serious about addressing the deep and irreconcilable conflicts between Enlightenment liberal and postmodern illiberal narratives, they would not confine their activities to writing articles in law reviews chronicling the failings of liberal legal analysis. The present legal system is so intertwined with Enlightenment modes of knowledge and ways of thinking that a truly radical critique would insist on abandoning the system altogether, perhaps in favor of some radically subjective, impressionistic model of justice along the lines of the late-nineteenth century French experiment known as *le phénomène Magnaud*.²³ But social

subjective and exclusive to each separately situated social observer. Jürgen Habermas once made a similar point about Richard Rorty's social constructionist-style suggestion that validity claims are not meaningful outside the very subjective circumstances of those who live the reality of those claims. Habermas argues instead for the possibility of "a validity claim that points beyond the provincial agreements of the specific local context," based on shared understandings of what constitutes rationally superior arguments. Jürgen Habermas, *Questions and Counterquestions*, in HABERMAS AND MODERNITY 192, 194 (Richard J. Bernstein ed., 1985). He goes on to point out that the debate over legitimacy assumes an underlying rationality that is necessary for communication about any problem to take place.

Any mutual understanding produced in communication and reproduced in the life-world is based on a potential reserve of reasons that may be challenged, reasons that force us to take a rationally motivated position of yes or no. . . . From the perspective of the participant, a moment of *unconditionedness* is built into the *conditions* of action oriented toward reaching understanding. From the perspective of the first person, the question of which beliefs are justified is a question of which beliefs are based on good reasons; it is not a function of life-habits that enjoy social currency in some places and not in others.

Id. at 194-95.

23. Benjamin Cardozo used this short-lived revolt against formal French jurisprudence as an example of a movement "to make the individual sense of

constructionists are upper-middle class academics, not true radicals. They do not (as did the true radicals of the Paris Commune, the nineteenth century utopian socialists, or even the Wobblies) seek to exterminate all vestiges of existing social and political structures in favor of formulating new and unique modes of social life. Instead, the various groups that coalesce around the concept of social constructionism act like traditional interest groups in seeking a bigger share of the pie for each group's benefit. The structural changes they propose are merely ways of tilting the system in their favor. In contrast to true radicals, the social constructionists do not want to overthrow the old regime; they simply want to put their own man or woman on the throne. Their policy objectives are then reduced to arguments about removing systematic restrictions on their chosen ruler's ability to enforce their own policy preferences.

This last point is critical, because it undermines the basic thrust of the social constructionist attack on liberalism. The social constructionists purport to reject what Lyotard calls "metanarratives"—i.e., rational frameworks devised to categorize, systematize, and thereby understand the messy facts that make up social reality. But in reality the social constructionists simply want to replace the dominant liberal metanarrative—which incorporates concepts of dispersed political power, protection for individual rights, and constitutional limits on government excesses—with a metanarrative of their own that imposes far fewer limitations on the exercise of political power in the interests of the favored groups.²⁴ This

justice in law as well as in morals the sole criterion of right and wrong." BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 138 (1921). The members of this movement were known as *les bons juges* (the good judges), and "[t]hey seem[ed] to have asked themselves in every instance what in the circumstances before them a good man would wish to do, and to have rendered judgment accordingly," even in the face of inconsistent statutes. *Id.* at 139.

24. To the extent that the various ideological groups discussed in Farber and Sherry's book have competing interests, there may be differences in the details of the metanarratives favored by, for example, critical race theorists and feminists. But each of these groups share basic assumptions about social analysis: they each adhere to the principles of social constructionism, reject the public/private distinction, and would abandon constitutional protections of individual rights when necessary to pursue an agenda based on interpretations of equality that would favor their groups. See Steven G. Gey, *The Case Against Postmodern Censorship Theory*, 145 U. PA. L. REV. 193 (1996) (describing each of these elements in critical race and feminist theory

brings the discussion back to the issue posed at the beginning of this essay: Is the metanarrative implicitly supported by social constructionists more or less politically progressive than the liberal metanarrative that they consistently oppose? The next section briefly sketches an answer to that question.

III. RATIONALISM, UNIVERSALISM, AND THE POSSIBILITY OF PROGRESSIVE POLITICS

It is my contention that the social constructionist theories addressed in Farber and Sherry's book *Beyond All Reason* tend to support a deeply conservative politics, despite the overt political progressivism of most social constructionist theorists. Moreover, it is my contention that these theories are incompatible with any seriously progressive critique of the established order, and are probably also inconsistent with the basic conception of democracy itself. I recognize that these are weighty charges. The full defense of these arguments would require much more space than is presently available, but the broad outlines of this critique can be set forth briefly.

As an initial matter, terms such as "progressive," "conservative," and even "democracy" are the subjects of great dispute within legal and political theory, but I am using these terms in the broadest possible sense, to denote basic elements that would be part of any reasonable definition of these concepts. Thus, as noted in the introduction to this essay, the term "conservative" is used here to denote skepticism about popular rule, resistance to social change, and deference to the relatively unfettered exercise of political authority. Conversely, the term "progressive" is used to identify any theory that views the persistence of any given political and economic hierarchy as problematic. A "progressive" political or legal theory therefore seeks to broaden access to political power for traditionally excluded individuals and groups, limit the

approaches to First Amendment protections of free speech). The differences in detail between the metanarratives favored by the different groups are therefore secondary to the similarities in the broad outline of the world view that the social constructionist metanarrative reflects. For a description of conflicting liberal and social constructionist metanarratives in the social constructionist literature, see Richard Delgado, *Campus Antiracism Rules: Constitutional Narratives in Collision*, 85 NW. U. L. REV. 343, 346-47 (1991) (contrasting the traditional First Amendment narrative, which emphasizes intellectual freedom from "superstition and enforced ignorance," with an alternative "minority-protection" narrative that focuses on issues of civil rights and racial discrimination).

arbitrary use of political power by any dominant faction in a manner that skews the system permanently in favor of that faction, and eliminate barriers preventing individuals or groups from obtaining power based on previous conditions of poverty or social exclusion. Finally, the term "democracy" is used to denote theories emphasizing the importance of popular consent to the allocation and exercise of political power. As used here, the term "democracy" can encompass very different mechanisms of communicating popular consent to governance, including both indirect representation and direct citizen participation. In all its manifestations, however, the term "democracy" incorporates the belief that popular consent is fluid, and power relationships are temporary and subject to change. Thus, a democratic political system must include some internal safeguards to ensure that a powerful faction does not use its presumptively temporary dominance to capture permanent control of the government.

Even if the relevant terms are used in this broad and least controversial manner, social constructionism's essentially conservative and even anti-democratic nature is evident. The doctrine's political failure stems from the core assertion of social constructionist theory that "truth" is entirely a subjective matter, which turns on the observer's perception and emotional reaction to reality rather than on the accuracy and rationality of the observer's description of and reaction to an objective reality that exists apart from the observer. The emphasis on the singularity of each observer's emotional reactions to the world means that social constructionists must reject the universalism and rationalism that characterizes modern liberal theory. They reject universalism because no person can communicate effectively that person's separate reality to another person who is "constructed" by a significantly different ethnicity and personal background. They reject rationalism because it imposes an oppressive structure on descriptions of reality that denies the subjective "truths" of individually situated observers. Yet by rejecting universalism and rationalism, social constructionists effectively abandon the two most critical tools of progressive politics.

To explain why this is so, it is necessary to define "universalism" and describe why universalism and rationalism are key components of truly progressive political and legal theory. The concept of "universalism" combines two complementary requirements of a progressive political theory: first,

the need to render universal abstract judgments that separate legitimate from illegitimate political outcomes, and second, the need to express in general terms common human responses to oppressive behavior.

With regard to the first requirement of universalism, a progressive political theory requires a comprehensive vocabulary of political critique, so that oppressive conduct can be distinguished from routine conflicts among political equals. To use examples drawn from recent European politics: the electoral defeat of the German Christian Democrats by the Social Democrat/Green Party coalition cannot be described as oppressive, but this term arguably could be applied to the previous German government's efforts to limit the citizenship and political participation of Germany's growing immigrant population.²⁵ Some political battles that have winners and losers are different from others, and a valid progressive political theory needs to take account of that fact. If the social constructionists are correct in asserting that all political values are based in the particular circumstances of each political group and therefore cannot be abstracted into a set of general political principles, there can be no universal political vocabulary to distinguish legitimate political battles from a dominant group's illegitimate subordination of defenseless political opponents. A progressive critique of injustice therefore becomes impossible. All political conflict is reduced to a battle between interest groups, and Nazis and Jews are thereby placed on the same moral plane.

The second respect in which universalism is necessary to a valid progressive political theory is as a reflection of common cross-cultural human responses to oppression. The point here is that every individual, regardless of background or political inclination, is likely to respond in the same way to certain kinds of arbitrary, oppressive political acts. Political principles should be able to represent in the abstract the typical human response to being harassed on the street (or arrested, or beaten) without cause by a policeman. (Or being arrested for speech that the state finds distasteful, or being fined for worshipping the wrong deity, or being convicted of a crime without

25. See Alan Cowell, *Like It or Not, Germany Becomes a Melting Pot*, N.Y. TIMES, Nov. 30, 1997, at A3 (describing the Kohl government's refusal to change a restrictive 1913 German immigration law). The new government has proposed liberalizing the 1913 law. See *2 German Parties Reach Deal To Relax Law on Citizenship*, N.Y. TIMES, Oct. 15, 1998, at A5.

a fair trial.) These universal human responses to tyrannical behavior are the basis of a comprehensive set of limits on all governments and political factions—even those that identify themselves as politically progressive.

In contrast to the stance of the traditional left, the cultural left represented by the social constructionists has abandoned the effort to articulate a universal response to oppressive governmental behavior that occurs in every culture sooner or later. By abandoning this effort, the social constructionists also abandon any attempt to address the common fears and travails that link all powerless people. Even worse, they also implicitly accept the possibility that some oppressive acts can be justified by other social interests that the state has decided to endorse. The abandonment of universal principles that limit the exercise of political power does not automatically lead to a latter-day Stalinist state, but even lesser oppressions should be incompatible with a comprehensively progressive political theory. Once the set of universal limitations on the exercise of power is subordinated to the short-term policies of a zealous government,²⁶ excesses and abuses cannot be far behind. And the slope is indeed slippery; it is a very short step from mocking the right to free speech (a favorite target of social constructionists) to slighting the rights to a fair trial, freedom from warrantless searches and self-incrimination, and protection against cruel and unusual punishments. If one individual liberty is a dispensable social construct, then so are the others.

The universalism advocated here should be distinguished from other, more comprehensive concepts that are sometimes identified by the same term. For example, I am not advocating (and indeed specifically reject) the much stronger variety of universalism proposed by the civic republicans, who assert their "commitment to universalism, or agreement as a regulative ideal, [which] takes the form of a belief in the

26. See, for example, Stanley Fish's typically forthright statement of the relationship between policies and principles: "[T]he relationship between policy desires and so called 'principles' is the reverse of what is usually maintained. The desires come first and last, and the principles, appropriately tailored, piece out the middle. The right way—no the only way—to proceed is to figure out what you think should happen and then look around for principles, First Amendment ones or any others, that will help you to get there." Stanley Fish, *Children and the First Amendment*, 29 CONN. L. REV. 883, 891 (1997).

possibility of settling at least some normative disputes with substantively right answers."²⁷ Strong universalism of this sort is problematic because it posits a set of essentialist social norms that are unrealistic and unobtainable in any pluralistic society. These norms come in the form of a uniform set of core beliefs that civic republicans argue should define a democratic society. "It is because of the belief in universalism that republican approaches posit the existence of a common good, to be found at the conclusion of a well-functioning deliberative process."²⁸ These core beliefs are essentialist because they are deemed normatively true—i.e., "better than others"²⁹—and may therefore be used to justify government action that prevents the dissemination of "false" views by dissenters to the dominant normative scheme.³⁰ Similar problems plague attempts to apply in the real world Jürgen Habermas's theory of communicative action, which he argues should produce a series of social norms (legitimately enforceable as law) "to which all possibly affected persons could agree as participants in rational discourses."³¹

The version of universalism advocated here is significantly less comprehensive than the strong universalism proposed by the civic republicans and Habermas. In fact, these forms of strong universalism share some unfortunate absolutist tendencies with social constructionist theory. Although they differ on the question of whether diverse constituencies can ever reconcile their policy differences and reach a consensus, both the strong universalists and social constructionists share a belief in the concept of "substantively right answers," and also share a belief that the identification and enforcement of substantively right answers are a valid basis for a progressive political theory.

27. Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1541 (1988).

28. *Id.* at 1554.

29. "The belief in universalism affirms instead that some perspectives are better than others, and that that claim can be vindicated through discussion with those initially skeptical." *Id.* at 1574.

30. For a more comprehensive explanation of this critique, see Steven G. Gey, *The Unfortunate Revival of Civic Republicanism*, 141 U. PA. L. REV. 801 (1993).

31. JÜRGEN HABERMAS, *BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY* 107 (William Rehg trans., 1996).

The absolutism inherent in such theories undermines any real possibility that a political theory with these traits could avoid the ossification and corruption that always accompanies the pursuit of final answers through the application of political power. A political system that attempts to ascertain and enforce a uniform set of "substantively right answers" will achieve only, in Justice Jackson's nice phrase, "the unanimity of the graveyard."³² A truly progressive politics can avoid the inevitable corruption and tyranny of such a system only by adhering to the sorts of weak universalist protections that make ongoing social critique possible, and which are necessary to keep the process of social evolution in motion.

Thus, as a logical matter, a proper progressive political theory should include a recognition of what I have called elsewhere "losers' principles"—i.e., principles that protect political losers from the coercive mandates of political winners forcing the losers to renunciate their moral and political values.³³ The countermajoritarian protections scattered throughout the Bill of Rights—including and perhaps especially the right of free speech—are specific examples of these principles. The irony here is that weak universalism (i.e., the protection of political and moral minorities through systematic limitations on the application of political power) is the only protection against the dangers of strong universalism (i.e., the use of political power to discover and enforce a set of "substantively correct answers" to collective and individual normative concerns). The weak universalism represented by losers principles suggests the possibility that ideological enemies who will disagree fundamentally about ultimate goods can nevertheless logically come to basic agreements about the sorts of structural protections from the excessive use of power that makes a long-term discussion of ultimate goods possible in a pluralistic society.

The concept of losers' principles unites progressive political theories with the most elementary requirements of democracy. The politically progressive aspect of this approach simply recognizes that losers' principles are likely to benefit the very kinds of powerless and disenfranchised groups that have

32. *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 641 (1943).

33. See Gey, *supra* note 30, at 879-97.

always been the constituency of the left.³⁴ The democratic aspect of this approach ensures that popular consent to the government's power—the sine qua non of any legitimate democratic state—remains viable over the long term by protecting present-day minority political factions that may become the political majority several generations hence. A failure to incorporate weak universalist protections against the excesses of power renders any putative democracy a sham because in the absence of such protections for ideological dissent any popular consent to political authority must be viewed as coerced and therefore invalid.

The antidemocratic tendencies of social constructionist theory can be traced to the dissonance at the heart of all versions of this theory. On one hand social constructionist theories are radically pluralistic in arguing that every group is constructed in a unique way that separates it from every other group. On the other hand, because they reject rationalism, empirical analysis, and other external critiques of each group's socially constructed perspective, social constructionists do not adopt an attitude of theoretical relativism toward assertions of truth. Instead, as noted above,³⁵ social constructionists argue that every group can adopt its own version of "truth," and each version of "truth" is insulated against all critiques by nonmembers of the group. In the end, social constructionists are pluralistic absolutists, in that they explicitly give every group the power to define truth for itself and, since the social constructionists refuse to recognize the legitimacy of liberal

34. The fluid nature of power and powerlessness in a world where one day's oppressed may turn into another day's oppressor probably accounts for the skepticism with which members of the Old Left (or even the Old New Left) have greeted postmodernist political theory's dismissal of the Enlightenment metanarrative of human emancipation in favor of the smaller and ultimately selfish goals of identity politics. See, e.g., Eric Hobsbawm, *Identity Politics and the Left*, 217 NEW LEFT REVIEW 38, 43 (1996) ("Let me state firmly what should not need restating. The political project of the Left is universalist: it is for *all* human beings. However we interpret the words, it isn't liberty for shareholders or blacks, but for everybody. . . . And identity politics is essentially not for everybody but for the members of a specific group only."); TODD GITLIN, *THE TWILIGHT OF COMMON DREAMS: WHY AMERICA IS WRACKED BY CULTURE WARS* 165 (1995) ("[W]hat is a Left if it is not, plausibly at least, the voice of a whole people? . . . If there is no people, but only peoples, there is no Left."). (Hobsbawm is a British historian with longstanding socialist credentials and Gitlin is a former president of the Students for a Democratic Society).

35. See *supra* note 4.

institutional limits on political power, they implicitly give every group that obtains ultimate power the authority to impose that group's "truth" on everyone else.

Viewed in this light, it is not surprising that social constructionists have little use for rationalism or empirical analysis. Rationalism is the cornerstone of both progressive politics and democratic theory because rationalism is the enemy of all ideological tyrants operating under the authority of some tendentious "truth" to skew the system in their favor. This is not to say that rationalist political theories are themselves immune from using the structure of rationalism as a cloak for self-deception, self-interest, and even tyranny. Theories that emphasize the centrality of rationalist discursive politics, such as civic republicanism and Habermas's theory of communicative action, are potentially just as oppressive as systems that operate on subjectivist faith.

Like the social constructionists, I am skeptical of claims that rational discussion of basic social values (such as "virtue," "good," or "evil") or value-laden specific issues (such as the permissibility of abortion or the legitimacy of the death penalty) can produce a consensus about such concepts or issues that can be justified by reference to the pristinely syllogistic discussions that lead to a presumptively correct conclusion. Like the social constructionists, I am equally skeptical that the participants in even the most concerted rational process of social decisionmaking will ultimately decide to adopt any set of social values for entirely rational reasons. Decisions about basic social values have their basis in the highly subjective—and often irrational—individual desires, beliefs, hopes, superstitions, and fears of the citizens who make up the society.

Yet even if the process by which social values are adopted is ultimately irrational, reason still serves a crucial function in a democratic political order. Even if reason does not serve the positive function of guiding the citizens of a democracy in adopting a set of social, political, and legal values, reason is still the most important *negative* element in critiquing whatever collective values currently define the status quo. Protecting the negative function of reason in social critique is crucial if (as liberal theory assumes) every ruler exercises power in a self-serving fashion, seeks to perpetuate the ruler's hold on power, and inclines toward suppressing dissent and opposition by whatever means the legal structure permits.

Reason as a negative value is also crucial in checking every ruler's natural tendency to color the public's perception of reality in a way that presents the ruler's views as representing the common good. Constitutionally limited political cultures incorporate the role of negative reason to limit efforts to manipulate public perceptions through the imperfect process of governmental persuasion and subtle incentives to adopt the party line.

Negative reason—that is, the use of reason, logic, and empirical challenges to the representations of reality offered by the political status quo—is crucial to keeping any powerful political actor in line. Reason destabilizes tyrants because it robs tyrants of the ability to deny the basis or consequences of their actions. The social constructionists claim that “truth” is a malleable, socially constructed, and therefore variable phenomenon. This claim is viewed benignly only because the social constructionists supposedly offer their theory on behalf of groups that do not currently have the power to define society in their own image. But such a theory has ominous implications in the hands of these (or any other) groups if they ever obtained power. If nothing exists except human consciousness, and controlling reality depends on controlling what people think about reality, then the primary goal of every government will be to establish control over the minds of its citizens.

In her essay on truth and politics, Hannah Arendt relates a conversation between the French Premier George Clemenceau and a representative of the Weimar Republic concerning the issue of guilt over the outbreak of the First World War. “What, in your opinion,” Clemenceau was asked, “will future historians think of this troublesome and controversial issue?” He replied, “This I don’t know. But I know for certain that they will not say Belgium invaded Germany.”³⁶ Arendt uses this as an example of the “indestructibility” of “brutally elementary data,” in the absence of “a power monopoly over the entire civilized world.”³⁷ But Arendt then hesitates before rejecting the possibility that such a power could exist:

[S]uch a power monopoly is far from being inconceivable, and it is not difficult to imagine what the fate of factual truth would be if power interests, national or social, had the last say in these matters. Which

36. ARENDT, *supra* note 4, at 239.

37. *Id.*

brings us back to our suspicion that it may be in the nature of the political realm to be at war with truth in all its forms, and hence to the question of why a commitment to even factual truth is felt to be an anti-political attitude.³⁸

A similar recognition may explain the social constructionist resistance to concepts of truth, rationality, and empirical analysis of their favored political premises. The heart of the social constructionist project is to politicize everything by subordinating Enlightenment notions of truth and individual freedom to postmodern conceptions of all-encompassing power and the collective interest in "constructing" a compliant citizenry. Maybe upon the successful completion of this project we would all be better off for the effort: happier, less conflicted, at one with our community, and less likely to resist well-intentioned efforts to mandate social rectitude. In such a world there certainly would be fewer individualistic square pegs resisting the appeal of society's round holes. But I suspect we could achieve such a peaceful state of affairs only in the manner that Orwell's Winston finds peace at the end of 1984—that is, only through the revelation that everything is all right, the struggle is finished, and we have finally won the victory over ourselves.³⁹

CONCLUSION

The quotation that introduces *Beyond All Reason* notes the importance of "nam[ing] rubbish as rubbish."⁴⁰ This quote is taken from Salman Rushdie, who can attest that the ethereal academic debate over social constructionism, rationalism, and principles of individual liberty have some very concrete consequences in the outside world. Theory matters, and if there is truth in the postmodernist axiom that the personal is political, it is equally true that for people like Rushdie the political is often dangerously personal.

Rushdie's problems resulted from his encounter with a government hell-bent (so to speak) on constructing a world around its own conservative Islamic ideology, and equally insistent on renouncing the values of religious toleration and artistic freedom that are two of the Enlightenment's more noble achievements. The fact that social constructionists can

38. *Id.*

39. See GEORGE ORWELL, NINETEEN EIGHTY-FOUR 300 (1949).

40. FARBER & SHERRY, *supra* note 1, at 3.

have nothing useful to say to the Iranian government in Rushdie's defense is a graphic example of how social constructionists can never deliver on their promise to create a more humane and progressive replacement for what is (in their view) a bloodless and arid liberalism. There are two lessons here for social constructionists: first, bloodlessness is not such a bad thing when the alternative is bloodiness, and second, the potential for bloodiness increases exponentially when political actions are justified by the sort of political sanctimony that social constructionism encourages.

I hasten to add that none of what has been said above is intended to imply that social constructionists should be censored or drummed out of the academy. Some of their work (Stanley Fish's, for example) is as consistently thought-provoking and entertaining as it is consistently wrong-headed, and even the worst examples of the social constructionist genre serve John Stuart Mill's function of providing "the clearer perception and livelier impression of truth produced by its collision with error."⁴¹ In any event, the cache of social constructionism has probably already peaked, and it is safe to predict that its proponents will soon be fending off the post-postmodernist theories of a new generation of radical young scholars in search of promotion and tenure in the Oedipal manner that the social constructionists have already perfected. So as befits the tenor of a liberal constitutional scheme that is still worth defending, the social constructionists can go right on building their castles in the sky; they just should not be allowed to make the rest of us live in them.

41. JOHN STUART MILL, *ON LIBERTY* 76 (Gertrude Himmelfarb ed., 1974).

